7-2200-5812-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Proposed Rules Governing Solid Waste Management Facility Permit Fees, Minn. Rules Parts 7002.0410 to 7002.0490.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on November 4, November 6 and November 7, 1991, in Bemidji, St. Paul and Mankato, respectively. Afternoon and evening sessions were conducted in Bemidji and Mankato. The St. Paul proceeding commenced at 9:00 a.m. and was conducted through the end of the business day.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 to 14.20 to hear public comment and to determine whether the Minnesota Pollution Control Agency (MPCA or Agency) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the MPCA after initial publication are impermissble substantial changes.

Dwight S. Wagenius, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the MPCA. The Agency's hearing panel consisted of Lanny Peissig and Rita Schild, Permit Unit Supervisors in the Ground Water and Solid Waste Division, Robert McCarron, Economist and Christine Leavitt, Pollution Control Specialist.

Sixty-six persons attended the hearings (22 in Bemidji, 19 in St. Paul and 25 in Mankato). Forty-three persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of the rules.

The record remained open for the submission of written comments for 15 calendar days following the date of the last hearing, to November 22, 1991. Pursuant to Minn. Stat. 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. At the close of business on November 27, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Agency staff submitted written comments responding to matters discussed at the

hearings and proposing changes in the proposed rules.

This Report must be available for review to all affected individuals upon request for at least five working days before the Agency takes any further action on the rule(s). The Board of the Pollution Control Agency may then adopt a final rule or modify or withdraw its proposed rule. If the MPCA makes changes in the rule other than those recommended in this Report, it must submit

the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Agency must submit it to the Revisor of Statutes for a review of the form of the rule. The Agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 29, 1991, the MPCA filed the following documents with the Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) a copy of the MPCA's Authorizing Resolution;
(c) a copy of the MPCA's proposed Order for Hearing;
(d) the Notice of Hearing proposed to be issued; and
(e) the Statement of Need and Reasonableness (SONAR).

A revised SONAR replacing in its entirety that filed on August 29, 1991, was filed with the Administrative Law Judge on September 27, 1991.

2. On September 27, 1991, the MPCA mailed the Notice of hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and all persons to whom the Agency gave discretionary notice.

3. On September 30, 1991, a copy of the proposed rules were published at 16 State Register 758.

4. On October 3, 1991, the MPCA filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;

(c) a copy of the Notice of Solicitation of Outside Opinion
together with all the materials received in response to
that Notice (none were received);
(d) the Agency's certification that its mailing list was
accurate and complete and the Affidavit of Mailing the
Notice to all persons on the MPCA's mailing list;
(e) an Affidavit of Additional Discretionary Notice; and
(f) an Affidavit of sending of the Notice to the Chairs of
House Appropriations and Senate Finance Committees.

5. On October 15, 1991, the Agency mailed a copy of the SONAR to the director of the Legislative Commission to Review Agency Rules in accordance with Minn. Stat. 14.131.

Statutory Authority and Nature of the Proposed Rules

6. The Agency is authorized by Minn. Stat. 116.07, subd. 4d (1990) to adopt rules for the collection of permit fees. The statute provides:

> The agency may collect permit fees in amounts not greater than those necessary to cover the reasonable costs of reviewing and acting upon applications for agency permits and implementing and enforcing the conditions of the permits pursuant to agency rules. Permit fees shall not include the costs of litigation. The agency shall adopt rules under section 16A.128 establishing the amounts and methods of collection of any permit fees collected under this subdivision. The fee schedule must reflect reasonable and routine permitting, implementation, and enforcement costs. . . . Any money collected under this subdivision shall be deposited in the special revenue account.

7. Minn. Stat. 16A.128, subd. 1a (1990) provides that ". . . unless the commissioner determines that the fee must be lowered, fees must be set or fee adjustments must be made so the total fees nearly equal the sum of the appropriation for the accounts plus the agency's general support costs, statewide indirect costs, and attorney general costs attributable to the fee function." The "commissioner" referred to in this statute is the commissioner of finance.

8. The Agency has documented its general statutory authority to adopt the proposed rule providing for permit fees for solid waste management facilities.

9. The proposed rules establish application, reissuance,

modification and annual fees for solid waste management facility permits. The proposed rules establish the amount of the fees and their manner of payment. Penalty provisions are included for late payments.

10. The 1991 Minnesota Legislature directed the Agency to replace General Fund appropriations with fee-based Environmental Fund appropriations. Specifically, within the Ground Water and Solid Waste Division, the Agency was directed to transfer $360,000 each year and six positions from the General Fund to the Environmental Fund. The statutes noted above mandate that permit fee funds approximate the cost of application, implementation and enforcement.
Pursuant to that mandate, the Agency proposes to establish application, reissuance, modification and annual fees for solid waste management facility permits. The expected amount collected from these various fees equals the $360,000 being transferred from the General Fund to the Environmental Fund, plus an increment to account for indirect program costs.

11. The Agency's annual fee target is $360,000, increased by $85,500 per year to account for indirect program costs. Indirect program costs include all general support costs not directly charged to Agency programs, such as costs of the personnel office, fiscal services and public information office. The Agency prepares an annual indirect cost plan that is approved by the Department of Finance each year. The plan includes both Agency and statewide indirect cost allocations. For fiscal year 1992, the Department of Finance

has approved an indirect cost rate using a method of allocation applying indirect costs to direct salary and fringe costs, of 28.5%.

The $360,000 loss in General Fund appropriations includes $300,000 in salary and fringe costs and $60,000 in supply and expense costs. Indirect program costs are the product of $300,000 x 28.5%, $85,500.

12. The Agency has proposed three fee categories related to program activities. The application fees apply to the review of an application for the permitting of a new facility. The reissuance or modification fees apply to permits which are being renewed or modified, and annual fees are assessed to cover implementation and enforcement costs. The fee schedule varies with the type of facility. The different facility types are Mixed Municipal Solid Waste (MSW) Land Disposal Facilities (with different fees for facilities receiving more or less than l00,000 cubic yards of waste per year, and an additional fee in such facilities which accept combustor ash), Industrial Solid Waste Land Disposal Facilities, Demolition Debris Land Disposal Facilities, Compost Facilities, Refuse-Derived Fuel Processing Facilities, Recycling (Processing) Facilities, Transfer

Facilities and Permit-by-Rule Facilities (for the disposal of demolition debris).

13. Two separate budgetary actions were taken by the 1991 Legislature that affected the permit function of the Ground Water and Solid Waste Division of the MPCA. One was a budget cut across-the-board for the MPCA that removed a total of $135,400 in fiscal years 1992 and 1993 from the Division's General Fund budget. This general cut reduced Agency program budgets and is not related to this proposal for a permit fee program. It is, however, the general budget cut referred to by persons who testified that the $360,000 per year proposed to be raised by fees was intended to be a budget cut and not merely a change in revenue source.

14. The 1991 Legislature also transferred appropriations and staff complement from the General Fund to the Environmental Fund within the MPCA. The proposed rule relates to that action. The Department of Finance had informed the MPCA that available General Fund money would not cover all program costs, and encouraged the Agency to reduce its reliance on General Fund appropriations. In its Biennial Budget Document, the Agency proposed to transfer some program dollars and staff from the General Fund to the fee-based Environmental Fund. Specifically, the MPCA proposed the transfer of $360,000 and six positions from the Ground Water and Solid Waste Division's General Fund appropriation to the Environmental Fund appropriation. The new revenues would be raised by establishing and implementing a fee program for solid waste management facilities. This proposal was made in part to respond to the recommendation in the 1990 Legislative Auditor's Report on the Agency that the Legislature authorize fees for Agency regulation of open solid waste management facilities. The Biennial Budget Document was presented to the Legislature as a guide in making appropriation decisions.

15. The Legislature responded by increasing the allocation of Environmental Fund appropriations to the Ground Water and Solid Waste Division. The legislative action created the need to increase existing fee rates or to establish new fees as a means of replenishing the fund in amounts equal to the appropriation.

16. The Minnesota Pollution Control Agency has established its specific statutory authority to adopt permit fees governing solid waste management facilities to cover the reasonable costs of reviewing and acting upon applications for Agency permits and implementing and enforcing the conditions of those permits.

Small Business Considerations, Impact on Agricultural Land

17. Minn. Stat. 14.115 (1990) requires the Agency to consider the impact of the proposed rules on small businesses.

The Agency addressed this requirement adequately in Part V. of its Statement of Need and Reasonableness.

Nearly all privately-owned solid waste management facilities in Minnesota qualify as small businesses under the statutory definition. However, the Agency maintains it is impossible to adopt less stringent compliance standards for such businesses in accordance with section 14.115, subd. 2 because adopting less stringent schedules for fee payments jeopardizes the relationship of cost incidence, which does not vary with facility size, and a varying of payment schedules might impact the ability to meet the Agency's biennial need for revenues. Some permit-by-rule facilities have been exempted from meeting rule requirements because they require negligible administrative time to permit and enforce permit requirements. Because small facilities that qualify as small businesses under the statute covered by the proposed rules require significant amounts of staff time, general exceptions from rule requirements for such facilities conflicts with the goal of the rules and the proposed fee schedule. To the extent it is possible, the MPCA has accommodated small business concerns.

18. The MPCA is required by Minn. Stat. 14.11, subd. 2 to consider the impacts of the proposed rule on agricultural lands. It is the Agency's position, and the Administrative Law Judge agrees, that the proposed rules will not have any impact on agricultural lands because they do not affect agricultural enterprises. The rules apply to solid waste management facilities. Therefore, there is no need for the MPCA to comply with the requirements of Minn. Stat. 17.80 to 17.84 in order to adopt the proposed rule.

Economic Considerations - Need and Reasonableness

19. The MPCA is required by Minn. Stat. 116.07, subd. 6 to take economic factors into account in its rulemaking. The statute requires:

> In exercising all its powers, the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible and practical under the circumstances.

The majority of testimony at the public hearings raised issues

having two common themes -- affordability and equity. County Commissioners and County Solid Waste Officers (SWOs) testified uniformly that they do not have enough money to pay the proposed fees and that the rates proposed are unfair because they impose the same fees on large and small facilities.

20. During the course of the hearing, Agency staff, using the latest available data, responded to the concern raised by each county or municipality in terms of what percentage or monetary amount those entities would have to increase their tipping fees or service charges in order to raise funds sufficient to pay permit fees proposed in this Rule. In its Post-Hearing Comments, the staff included a table presenting data and analyses relating to the resources permittees have available to pay for the proposed fees. It is the position of the staff that facility operators will "pass through" the cost of permit fees to users of their facilities. If the operator is a private individual or firm, facility users will have to pay a higher tipping fee. If the operator is a local government, fee costs may be passed through to facility users in other ways. Some local government permittees charge no tipping fees, relying instead on annual service charges levied on county taxpayers to pay for facility operations. Others assess both tipping fees and service charges, while some rely solely on tipping fees. The table attached to the staff's Comments shows that, in all but a few caes, tipping fee increases needed to pay the proposed fees are very small.

21. In certain locations, counties would have to raise tipping fees by more than 20% from their current level in order to pay the permit fees proposed by the Rule. Many county governments assess service charges to pay for some or all facility operating costs. The staff suggests that service charges can be used to keep down tipping fee increases by raising the service charges to minimize the impact of the fees. In its Post-Hearing Comments, the staff demonstrated that the implementation of service charges to fund permit fees would have a minimal impact. The highest annual per capita fee cost would be in Cook County, 71 cents per person. Seventy-one cents per person amounts to 5 one-thousandths of one percent of 1989 per capita income in the county. Based on that demonstration, the staff argues that the fees are not high with respect to the personal income of people who would have to pay the fees. It is found that the MPCA has demonstrated by means of an affirmative presentation of facts that the overall economic impact of the imposition of the fees proposed was given due consideration and the impact is not unreasonable.

22. With respect to present ability to pay, many of the counties maintain that they may not have the cash on hand to pay fees when they become due. Since county budgets are set in October, witnesses argued that their governments cannot pay for expenses that are not anticipated. The staff questions why fee expenses were not anticipated. It maintains that it made a conscientious effort to inform permittees about the proposed permit fee rules.

On July 19, 1991, the Manager of the Solid Waste Section of

the Ground Water and Solid Waste Division of the MPCA made a presentation to the Association of Minnesota Counties' (AMC) Environment and Natural Resource Policy Committee. The presentation included discussion of the proposed permit fee rules, and a draft of the fee schedule was distributed at the meeting. Follow-up meetings discussing the permit fees were conducted on August 16 and September 12, 1991. All permittees were sent copies of the proposed rules on

August 16, 1991. It is found that the Section Manager's presentations before the AMC's Environment and Natural Resource Policy Committee in July, August and September, 1991 and the mailing of the proposed rules in August of 1991 gave permittees timely notice that the permit fee payments should be included in their budgets for 1991.

23. The MPCA staff suggests that other means can be used to meet unbudgeted expenses for permittees who did not react to notices from the Agency in time to allow for the new rules in their budgets in October, 1991. They maintain that standard accounting practices allow inter-fund borrowing and lending. Since neither tipping fees nor service charges are subject to the legal limits imposed on property tax levies, permittees can create a solid waste fund to use future revenues from tipping fees or service charges to repay any loan that might be needed to provide cash for timely payment of the permit fees.

The proposed rules require payment 60 days after the rules take effect for the fees due in the State's 1992 fiscal year (July 1, 1991 through June 30, 1992). The first fee payments are likely to be due in March or April of 1992. The validity of requiring full fee payment in the third or fourth quarter of the fiscal year was raised, and it was suggested that the first fee assessment might be a retroactive charge for costs incurred before the proposed Rule takes effect. Another consideration as to the timing of fee payments is that the first two payments under the proposed rule may be made within the same fiscal year for counties (calendar year 1992), even though payments are required in different fiscal years for the State.

24. In its Post-Hearing Comments, the Staff acknowledged that many local government units simply did not budget an appropriate amount to pay the permit fees proposed in the Rule for the first year that the permit fee program would take effect. Therefore, the Staff recommends that the payment schedule be changed so that fee payment for the 1993 fiscal year is due on January 15, 1993, and that all payments thereafter will be due on January 15 of following years. To implement this, the staff proposes striking the words "August 1" from proposed Part 7002.0470 and substituting "January 15". Further clarification of this part is proposed by striking the word "of" in the fourth sentence and replacing it with "after". The changes proposed for Part 7002.0470 are found to be necessary and reasonable, and do not

constitute substantial changes. The proposed change is reasonable because it schedules the 1993 fee payment for a different fiscal year for the counties, and schedules the payments at a time two months after county budgets are set. The change is not substantial because the issue of timing of payment was raised in the originally-published Rule.

25. It is found that the timing of fee payments does not create a rule that would be impermissibly retroactive. No effort is made to recover costs incurred prior to the effective date of the legislation which created the need to devise a fee schedule.

As noted by the Agency in its Post-Hearing Comments, inappropriate retroactivity requires that those imposed on have some private vested right imperiled by the retroactive act. In this case, those imposed on are public permittees who are conducting solid waste management operations by permission of the State. They have no vested right not to pay fees which are authorized by law. The permit each permittee holds "does not convey a property right or

exclusive privilege". Minn. Rules pt. 7001.0150, subp. 3.C. The public interest recognized by the Legislature in the 1991 Appropriation Act requires imposition of the fees, the means chosen are reasonably necessary for accomplishment of the purpose of cost recovery and the result is not oppressive on individuals. Thus, the Rule proposed satisfies the standards set out in Fleck v. Spannaus, 449 F. Supp. 644, 652-53 (D. Minn. 1977).

26. The MPCA asserts that the timing of the fee payments for costs previously incurred does not raise retroactivity issues. This argument does not recognize that it is not the legislation that is being retroactively applied, but the proposed permit fee rules. The fact is that these rules have a retroactive effect in imposing payments for costs incurred prior to their effective date. Retroactive regulation is not prohibited, but it is limited carefully. By definition a rule must have ". . . general applicability and future effect." Minn. Stat. 14.02, subd. 4. The U.S. Supreme Court has noted that "retroactivity is not favored in law . . . even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208-09, 101 S. Ct. 468, 471 (1988). See also, Mason v. Farmers Insurance Company, 281 N.W.2d 344, 348 (Minn. 1979). If the Legislature has authorized a retroactive effect, it is still required that it be reasonable for the Agency to apply the rule retroactively. Furthermore, retroactive application is subject to a higher level of scrutiny that prospective application.

Here, legislative action created the need for the Agency to collect fees for costs incurred during the 1992 fiscal year. The

MPCA was directed by the Legislature to allocate more funds to the Environmental Fund, which funds were not covered by an appropriation. Minn. Stat. 116.07 authorizes the Agency to collect fees to cover the costs of reviewing and acting on applications and implementing and enforcing permits. It is reasonable to impose fees for costs incurred in the 1992 fiscal year, particularly given the fact that the staff has suggested moving the subsequent due dates for fees up to January 15 and has informed the counties on three occasions about its intention to create permit fees.

27. The counties argue that facilities with different capacities and income should not be charged equal fees. They question whether a system that imposes equal fees is fair and equitable.

The MCPA Staff maintains that fee amounts as proposed in the Rule are related directly to the administrative costs incurred for the issuance of permits and monitoring of the facilities. The Staff maintains that those raising the fairness argument fail to take into account the fixed cost elements of permit review and administration. The Staff has demonstrated that the amount of work required to review and administer solid waste facility permits is not related to facility size. Small sites can take up much administrative time and large sites can require relatively little. The administrative costs incurred do not vary with each cubic yard of waste received or the volume of capacity designed.

28. The proposed permit fees vary with respect to their cost incidence among regions and among income groups. The widest variance in per capita costs occurs outside the metropolitan area. However, in no case do fee costs

per capita amount to an appreciable fraction of per capita income. Any differential impacts are negligible.

29. A number of county representatives testified that fees should be based on volume of waste received. The Staff responded that the authorizing statute allows the Agency to collect permit fees in amounts not greater than those necessary to cover the reasonable costs of reviewing and acting upon applications for Agency permits and implementing and enforcing the conditions of the permits pursuant to Agency rules. Fee schedules must reflect reasonable and routine permitting, implementation and enforcement costs.

The Agency staff estimated the number of hours expended on new permit applications, reissuance applications and routine annual activities for each type of solid waste facility. The estimates were based on Staff hours spent performing these permit activities in the past. The Staff has demonstrated the relative amount of time spent on the various categories of solid waste management facilities. The relative proportions were used to determine the amount charged per permit. From data available,

the Staff also determined estimated numbers of application, reissuance, modification and annual permits during a fiscal year. The amount actually charged for a particular permit for a perticular type of facility is thus determined by considering both the numbers of permits anticipated for review and the relative amount of Staff time spent on particular types of permits, all with a view to raising approximately $445,000 per year. See Attachments 6 and 7 to the SONAR.

30. A number of county representatives testified that the time required to permit demolition debris landfills in Greater Minnesota is less than the time required to permit demolition debris landfills in the metropolitan area. The Staff has demonstrated that the amount of time needed to review a permit application, make initial and final site visitation including documentation, for development of permit requirements, for public notice and clerical work spent on an application and for time spent responding to comments and issuing of permits is a function of site condition and public concern rather than the amount of a facility's waste receipts, size or location in or out of the Twin Cities area.

Additional time is required for sites that need hydrogeologic studies or for which contested case hearings are requested. During the past year, hydrogeologic work has been conducted on eight demolition debris landfills, five of which were located outside the Twin Cities Metropolitan Area. Also, during the past year contested case hearings were requested on three demolition debris landfills, all of which were located in Greater Minnesota. It is found that the MPCA has demonstrated by an affirmative presentation of facts that the fees charged for demolition debris landfills are reasonable because they correlate with basic Agency administrative costs.

31. Another concern noted at the public hearings was whether one solid waste management facility permit would be subject to more than one set of fees. The Staff responded that the fee schedule and expected fee revenues are based on a facility's permit, regardless of whether the permit may have more than one facility type operating under it. One permit means one set of fees, with the exception of a surcharge on municipal solid waste landfills that accept solid waste combustor ash. To clarify the application of fees, the Staff proposes adding another sentence to the originally-published first paragraph of proposed Part 7002.0430. The additional sentence reads:

> A person shall pay the set of fees that corresponds to their solid waste management facility permit.

It is found that the change proposed is clarifying in nature and, therefore, necessary and reasonable. It does not constitute a substantial change. For additional clarification, the heading at

the first line of the table following the paragraph text of subpart .0430 is proposed to read "Facility Permit Type", instead of the originally-published "Facility Type". This change is clerical and clarifying in nature, is found to be necessary and reasonable, and does not constitute a substantial change.

It is suggested the Agency further clarify the meaning of this part by adding the words "single" between "the" and "set" and "most costly" between "their" and "solid" in the proposed additional sentence. It is suggested further that the word "its" be substituted for "their" (or "Persons" for "A person") in order to make singular-plural relationships consistent. These changes are found to be necessary and reasonable and do not constitute substantial changes.

32. The rules include two sets of fees for municipal solid waste (MSW) land disposal facilities. The more expensive set of fees is applied to facilities with annual receipts greater than 100,000 cubic yards. The distinction was made because a facility receiving 100,000 cubic yards or more of solid waste per year must file an Environmental Impact Statement (EIS), which requires additional Agency Staff time to coordinate and review. The Environmental Quality Board requires an EIS to be prepared for the construction of a MSW landfill that receives 100,000 cubic yards or more of waste fill per year, or for the expansion by 25% or more of a MSW landfill that receives 100,000 cubic yards of waste fill per year. See Minn. Rules Part 4410.4400, subp. 1.

The staff maintains that a MSW landfill that accepts 100,000 cubic yards or more of waste per year also takes more staff time for review of documents such as permit applications, reissuance and modification requests and annual reports. Additional time is needed to conduct inspections, review hydrogeologic evaluations and engineering design plans. Larger landfills generally have larger service areas and receive more varied types of waste streams that require additional Staff time for the review of industrial waste management plans. They also generally have separate areas for the disposal of demolition debris, for recycling and for storage of wastes. Any additional operations require more Staff time for review.

It is found that the Agency has demonstrated by an affirmative presentation of facts that a two-tiered system of fees for municipal solid waste landfills is necessary and reasonable.

33. The rule as originally published provides for a $200.00 application fee for Permit-by-Rule facilities handling demolition debris for disposal on land. The Agency's solid waste management facility rules include a Permit-by-Rule provision (Minn. Rules pt. 7001.3050, subp. 3). Under that rule, demolition debris land disposal facilities designed for less than 15,000 cubic yards total capacity and operating less than a total of 12 consecutive months, not located adjacent to another demolition debris Permit-by-Rule facility and in compliance with certain specific siting, design and operating

requirements are deemed, by rule, to have obtained a solid waste management facility permit without making application for it, unless the commissioner finds that the facility is not in compliance with the requirements.

34. During the hearings, persons testified that some Permit-by-Rule demolition debris landfills are used just once to handle the disposal of small buildings on a person's own property. There is a difference between on-site one-time disposal operations and facilities that accept larger quantities of demolition debris from other locations over a longer time. Witnesses were concerned that, with a $200.00 fee as proposed, many persons disposing of small buildings on their own property will not notify the authorities and simply bury the debris on their land or transport it somewhere else and dump it in a ditch or under some cover.

In response to that concern, the MPCA proposes to adjust the permit fee schedule to distinguish between on-site, one-time disposal operations and typical Permit-by-Rule demolition debris landfills. They propose creating a new permit type, to be called "On-site, One-time Demolition Debris Land Disposal Facilities". The application fee for such type facilities is $50.00. As part of this change to the proposed rules, the Agency Staff proposes adding a new definition at Part 7002.0420, to read as follows:

> On-site, one-time demolition debris land disposal facility. "On-site, one-time demolition debris land disposal facility" means a site at which a property owner disposes of demolition debris from a single process of demolition on the landowner's property.

35. The proposed rules apply to operating facilities that impose administrative costs on the Agency. Permit-by-Rule demolition debris landfills require time and resources to ensure that conditions of Permit-by-Rule facilities are met. A typical facility will be inspected to determine the appropriateness of the site and compliance with locational requirements. Agency staff must also review the Permit-by-Rule application or notification. All of this is true even for on-site, one-time demolition situations.

Because of the fact that imposing a fee on Permit-by-Rule Demolition Debris landfills may mean some people will not apply for a permit, the staff has attempted to accommodate that concern by recommending the change noted above. The addition of a category for on-site one-time demolition debris landfilling is found to be necessary and reasonable, as is the fee proposed of $50.00 for permit application. The change is found not to be a substantial change because the issue of the appropriateness of such a category was raised by notice in the originally-published rules of a separate permit type for Permit-by-Rule Demolition Debris Land Disposal Facilities. It is further found that to add a definition for on-site, one-time demolition debris land

disposal facilities is appropriate for clarification purposes and, therefore, necessary and reasonable. The definition as drafted is also found to be needed and reasonable. The addition of a definition for on-site, one-time demolition debris land disposal facilities is further found not to be a substantial change.

36. The rules as published in the State Register provide for a late charge of 20% of the payment due for failure to submit the appropriate reissuance or annual fees within 30 days of the required date. Permittees are

also assessed with an additional ten percent of the balance owed for each 30-day period or portion of a period that the fee and late charge remain unpaid.

Some commentators argued that the late charge is punitive and redundant. They argued that the proposed fee rules already have incentives that will encourage fee payment and that the Agency has other enforcement actions that can be used if a permittee does not pay fees.

The Agency Staff responded that late charges are a penalty for noncompliance with the rules. They are not intended to cover costs, but to penalize persons who do not comply with the fee requirements. They maintain that late charges need to be made high in order to provide an incentive for timely payment. Late charges do not apply to application fees because stopping permit review provides adequate payment incentives.

37. The Agency argues that late charges are a necessary and reasonable measure to encourage prompt payment and allow the Staff to refocus its resources on environmental protection rather than bill collecting. They point out that when a permittee fails to submit fees on time and continues to operate out of compliance, the Agency must take enforcement action such as issuing a Cease and Desist Order or an Administrative Penalty Order. Most enforcement actions available to the Staff require authorization from the MPCA Board and opportunities for contested case hearings, all of which require time and money. The Staff also argues that it has been the experience of other divisions of the MPCA that late charges have encouraged prompt payment of fees and the development of an efficient collection program.

It is found that the proposal to impose a 20% late charge for the first month of delinquency, and 10% per month thereafter is necessary and reasonable because it is supported by a rational basis -- to emphasize to permittees the importance of timely payment.

Another inquiry to the Staff involved whether a permittee who makes partial payment of their fees will incur late charges based on the remaining balance due or on the entire fee due. In its Post-Hearing Comments, the Staff responded that the rules require

full payment and that it will be the Agency's policy to return partial payments with a letter requesting full fee payment and explaining the consequences of late payments in accordance with the Rule.

38. The final sentence of the proposed subpart regarding late charges reads "The commissioner may begin a proceeding to revoke the permit if the reissuance fee or annual fee is not paid by the required date." It is found that the use of the word "may" in this context is appropriate because it does not add any discretion which the Agency does not already have. In its final Comments, the MPCA proposed to add the words "under part 7001.0190" between the words "proceeding" and "to" in the final sentence of the subpart concerning late charges in order to clarify the type of revocation proceeding that may be taken against a permit if fees are not paid by the required dates. Further clarification is proposed by substituting the word "after" for the word "of" in the first sentence of the subpart regarding late charges in order to make clear that permittees have a 30-day "grace period" beyond the date due for payment of fees. The proposed changes from the originally-published Part 7002.0480 are found to be needed and reasonable and do not constitute substantial changes.

39. The requirement that fees be paid when a permit application is submitted was questioned because the permit may be denied. In response, the Agency demonstrated that the steps required to deny a permit are the same as those required to issue a permit. Staff must review the application, visit the site, issue a public notice and give the applicant an opportunity to request a contested case hearing. See Minn. Rule 7001.0100. It is not unreasonable for the Staff to believe that if application and reissuance fees are not paid in full and in advance, it would be difficult to collect the remaining balances owed by persons whose applications or requests are rejected.

40. In order to clarify the rules further, the Agency Staff proposes two changes in Part 7002.0420 (Permit Modification) at subparts 3 and 4. It is noted that these subparts will now be renumbered as 4 and 5, respectively, because of the new definition added for on-site, one-time demolition debris land disposal facilities.

At subpart 4, the Agency proposes to add an additional sentence, which would read "A request for a minor modification as defined in Part 7001.0190, subpart 3, does not require a modification fee". The purpose of this additional language is to provide a reference to "minor modifications" for which permit applications and fees are not required. At newly-numbered subpart 5, the phrase "in accordance with parts 7001.0040 to 7001.0140." is proposed for addition at the end of the originally-published definition of "permit reissuance". The reference is to the subparts of rules governing MPCA permits that

lay out the application process.

The two changes noted above are found to be clarifying in nature and do not change the meaning of the proposed definitions. They are found to be necessary and reasonable and do not constitute substantial changes.

41. The "minor modifications" that do not require payment of a permit fee are correction of typographical errors, changes in an interim compliance date of up to 120 days or a change in the provision of the permit that will not result in an actual or potential increase in the emission or discharge of a pollutant or that will not result in reduction of the Agency's ability to monitor compliance. Permit modifications require significant staff time, whereas minor modifications are fairly simple procedures, often as simple as sending a letter. The clarifying change noted in the preceding Finding was made to make clear that minor modifications are exempted from the proposed rules.

42. Witnesses in Mankato testified that the Agency's estimate for replacing lost appropriations was not based on good data and that the Agency was likely to collect more money than the $445,500 total of $360,000 Environmental Fund appropriation plus $85,500 in indirect costs.

The staff responded that they used the most reliable data available in estimating projected fee revenues. They used historical information on the number and types of solid waste management facilities permitted by the Agency over the past nine years. See Attachment 10 to the Agency's Post-Hearing Comments. Also taken into consideration was an assumption that the proposed rules will not become effective until sometime in early 1992, so the anticipated new facility applications were based on the number of new applications likely to come in over the remaining 18 months of the biennium.

Suggestion was made at the Bemidji hearing that the Agency should have contacted all counties and asked them what they planned to do regarding the permitting of solid waste management facilities over the next few years. The Staff responded that it is their experience that expressions of intent on the part of persons seeking permits for new facilities have not provided reliable information for projecting staff permitting work loads and that they believe that basic and projected application fee revenues on historical information is a much more reliable and reasonable approach.

43. In estimating fiscal year reissuance fee revenues, the Agency multiplied the number of facility-specific permits expiring between January 1, 1992 and June 30, 1993 by the appropriate reissuance fees and divided this amount by two to account for fiscal year projected revenues. In estimating annual

fee revenues, the Agency multiplied the number of specific solid waste management facilities operating in July 1991 by the appropriate annual fee. The method of determining expected fee revenues was discussed with officials of the Department of Finance and later approved by the designee of the Commissioner of Finance. See Attachment 4 to the Statement of Need and Reasonableness. It is the MPCA's intention to amend the permit fee schedule so that revenues are nearly equal to the Environmental Fund appropriation if the Agency falls short or exceeds fee appropriations.

It is found that the MPCA's methodology for deriving its fee schedule is reasonable.

44. The final part (7002.0490) of the proposed rules relates to notification of error, and provides that a person who believes that a fee assessment or late charge is in error shall provide written evidence of the alleged error to the Commissioner along with payment of assessed fees and late charges. The part provides further that overpayments shall be refunded if the Commissioner finds, upon reviewing the data, that the assessed fee and late charge are in error.

In response to a suggestion that this part clarify the procedures involved
in the notification of error process, and lay out appropriate recourse for permittees or applicants, the Agency proposes to add the following sentence at the end of the part:

> If, upon reviewing the data, the commissioner finds that the fee or late charge was properly assessed, the commissioner shall promptly notify the person, who may seek redress before the agency in accordance with chapter 7000.

Minn. Rules Chapter 7000 are the procedural rules for the Minnesota Pollution Control Agency. The methods of redress included in those rules are variances, stipulation agreements, contested case hearings and schedules of compliance. Addition of the above-quoted sentence is found to be necessary and reasonable in order to clarify the rights of applicants and permittees. The addition does not constitute a substantial change because the question of how the Agency will make its findings and that of how persons can seek redress was raised by implication in the part published in the State Register.

For further clarification, it is suggested that the Agency insert the words "in writing" after "person" in the sentence proposed for addition at the

end of the subpart. Such a change is found to be needed and reasonable and would not constitute a substantial change but merely clarifies the subpart further. If that suggestion is

adopted, it is suggested further that the sentence end after "in writing" and a new sentence starting with the words "The person" instead of "who" be structured. These clerical changes, designed to make the rule read more clearly, are not substantial and are found to be needed and reasonable.

Other Comments

45. State Senators Moe, Lessard and Morse expressed deep concern about what they perceive as inequities in the proposed fee schedule and an ignoring of the situation in Greater Minnesota. They charge specifically that the proposed fees fail to account for differences in cost of monitoring the large metropolitan area facilities as compared to monitoring the typically smaller facilities in Greater Minnesota. They cite the fact that nine of the eleven largest demolition debris facilities in the State are in the Metro area, and argue that facilities handling less volume are less able to pay the fees.

46. The Senators, along with the Association of Minnesota Counties (AMC), advocate moving from the proposed "flat" fee schedule to a tiered or volume-based schedule that recognizes the lower costs associated with monitoring smaller facilities. They also urge the MPCA to withdraw the proposed schedule and seek greater input from Agency staff, county solid waste officers and county commissioners in Greater Minnesota. They consider such a dialogue necessary and offer their services in setting up such meetings.

47. The MCPA responded to the concerns and suggestions noted in the preceding two Findings by noting that permit administration costs are related to facility type, not to size or annual waste receipts, and that the fee schedule correlates appropriately to the Agency's costs of administering permit activities. The Staff notes that application of unit-cost methodologies for setting fees would result in a subsidizing of smaller facilities by the larger facilities. The MPCA recognizes that there are disparate financial impacts created by the fee schedule, but notes that the degree of impact is nonetheless minimal.

Regarding the issue of soliciting more outside input to the proposed Rules, the MPCA responds that it decided that an internal rule drafting task force consisting of persons from the Agency's central office was adequate in this instance because of the staff's experience with hazardous waste, air and water permit fee rules, because of the data available to the staff on administrative permit costs, and because of the need to proceed with rulemaking as rapidly as possible to recover costs expended during fiscal year 1992.

48. Ms. Barbara Johnson, attorney for the Association of Minnesota Counties, argued that the proposed rules were unreasonable because they required all fees for fiscal years 1992 and 1993 to be paid in 1992. That concern was addressed by the staff in its proposed change to require any payments after 1992

to be due on or before January 15 of any given year, starting with January 15, 1993.

Ms. Johnson also opposes the imposition of late fee charges as punitive and unnecessary. On behalf of the AMC, she recommends a revision of the rules so there would be no late fee charged when a permittee fails to submit the permit fee with a new permit application or permit reissuance application. The staff responded by noting that there is no penalty for failure to submit the permit fee with a new permit application other than suspension of work on the permit. They declined to support dropping of penalties for late submission of reissuance fees because those instances involve facilities that would continue to operate and require ongoing monitoring or enforcement activity by the staff.

49. The AMC proposes a revision of the rules for late charges on annual fees so that the late charge would become only a one-time charge amounting to less than ten percent of the annual fee which is due. The staff responded that to assess a one-time charge on annual fees would not provide adequate incentive for a permittee to submit its annual fee on time. If Ms. Johnson's proposal was adopted, late charges would range from only $125.00 to $475.00, and permittees that do not pay fees would continue to operate out of compliance until the Agency could take enforcement action. Any permittees facing a one-time, ten percent late charge may be in a position to decide that the charge is small enough to make operating out of compliance worth their while. In addition, the anticipated increase in enforcement actions would cost the Agency more than noncompliance costs the permittees.

50. Ms. Johnson also recommends establishing a system for rebating a portion of the application or permit reissuance fees when the MPCA fails to issue permits in a timely manner (within 180 days of receipt of the completed application). The staff responded that any failure on the Agency's part to issue or reissue permits in a timely fashion does not minimize the administrative costs of processing the permit. Since the purpose of the fee schedule is to recover revenues to replenish the Environmental Fund, the staff does not find the rebate proposal to be reasonable. The MPCA notes that its solid waste permit program is implementing changes to expedite their permit review process to meet legislative time requirements.

51. Ms. Johnson also recommends that Recycling (Processing) facilities be exempt from the permit fee rules because the proposed fees discourage recycling activities. In response, the staff notes that the proposed rules do not apply to Permit-by-Rule recycling facilities, which comprise over 90% of all recycling facilities, but apply only to municipal solid waste recycling facilities that receive permits under Minn. Rules 7001.0040 to 7001.0210. The permitting process requires public

notice, a presentation before the Agency Board, and possibly contested case hearings. These activities take considerable staff time, which brings them within the scope of the Agency's fee authority. The staff also notes that the fee imposed on permitted recycling facilities is relatively small, so that it is unlikely to discourage recycling.

52. Any portions of the proposed Rule not specifically discussed above are found to be necessary and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Minnesota Pollution Control Agency gave proper notice of the hearing in this matter.

2. That the Agency has fulfilled the procedural requirements of Minn. Stat. 14.14, and all other procedural requirements of law or rule.

3. That the Agency has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Agency after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this day of December, 1991.

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped (Bemidji, Mankato)
Transcripts: Lori Case, Shaddix and Associates (St. Paul)
Jeffrey J. Watczak (Mankato)

December 24. 1991

Charles Williams, Commissioner
Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155

Re: In the Matter of Proposed Rules Governing Solid Waste Management Facility Permit Fees, Minn. Rules Parts 7002.0410 to 7002.0490; OAH Docket No. 7-2200-5812-1

Dear Commissioner Williams:

Enclosed and served upon you, please find Report of the Administrative Law Judge in the above-entitled matter. I am herewith enclosing the official record to you, including transcripts of the St. Paul and Mankato hearings and tapes of the Bemidji hearing, and I am now closing my file.

Very truly yours,

RICHARD C. LUIS
Administrative Law Judge

Telephone: 612/349-2542

RCL:lr

cc: Dwight Wagenius

Service List

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St. Paul, MN 55155

December 24. 1991

Donna J. Anderson, Executive Director
Crime Victims Reparations Board
N-465 Griggs Midway Building
1821 University Avenue
St. Paul, MN 55104

Re: In the Matter of Wendy M. Walsh; OAH Docket No. 69-2401-5896-2

Dear Director Anderson:

Enclosed herewith and served upon you by mail are the Findings of Fact, Conclusions and Recommendation of the Administrative Law Judge in the above-entitled matter. Also enclosed is the official record, with the exception of the tape recording of the hearing. If you would like a copy of those tapes, please contact our office in writing or telephone 341-7642. Our file in this matter is now being closed.

Yours very truly,

STEVE M. MIHALCHICK
Administrative Law Judge

Telephone: 612/349-2544

SMM:lr

Enclosures

cc: Wendy Walsh
Jacquelyn Albright

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